Supreme Court, U.S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-911 and 78-1036

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, *ET AL.*,
Respondents.

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, *ET AL.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE OF REPUBLIC STEEL CORPORATION

FRANK E. MORRIS
MICHAEL A. KAUFMAN
PENNIE & EDMONDS
330 Madison Avenue
New York, N. Y. 10017
(212) 986-8686
Counsel for Respondent,
Republic Steel Corporation

Of Counsel:

EDWARD P. WEBER, JR.
Republic Steel Corporation
P.O. Box 6778
Cleveland, Ohio 44101

January 26, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-911 and 78-1036

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,

Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, ET AL.,

Respondents.

RAY MARSHALL, SECRETARY OF LABOR,

Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, ET AL.,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE OF REPUBLIC STEEL CORPORATION

Republic Steel Corporation ("Republic") submits this response to the Petitions for a Writ of Certiorari filed by the Industrial Union Department, AFL-CIO ("IUD") and the Secretary of Labor seeking review of the Fifth Circuit's decision in *American Petroleum Institute* v. *OSHA*, 581 F.2d 493 (5th Cir. 1978). These petitions were filed on December 7, 1978 and December 26, 1978, in Nos. 78-911

and 78-1036, respectively. On December 29, 1978, all non-Government respondents requested an extension of time to permit simultaneous response to these petitions. On January 2, 1979 the time for responding was extended to January 26, 1979.

The decision below is set forth at pages 1a to 33a of the Appendix filed by IUD.[1] The basis for this Court's jurisdiction and the statutes and regulations involved are set forth in the petitions filed by IUD and the Secretary of Labor.

Questions Presented

The questions presented concern the development of an occupational health standard by the Occupational Safety and Health Administration ("OSHA"). An occupational health standard is defined at 29 USC 652 (8). It is required by statute to be feasible, 29 USC 655(b)(5); and considerations of feasibility are recognized to involve both economics and technology. The standard in question regulates exposure to benzene ("the benzene standard"). Part of the benzene standard sets a maximum permissible exposure limit to benzene.

1. Whether OSHA is required to weigh the costs and benefits of an occupational health standard in order to establish its economic feasibility under 29 USC 655(b)(5)?

2. Whether the standard of review of the feasibility of a permissible exposure limit promulgated under 29 USC 655(b)(5) is substantial evidence in the record considered as a whole?

These same questions are presented by Republic in a Petition for a Writ of Certiorari, No. 78-918, to review the opinion and judgment of the United States Court of Appeals for the Third Circuit in *American Iron and Steel*

[1] This Appendix will be referred to in the form "App. at ——a".

Institute, et al. v. *OSHA*, 577 F.2d 825 (3d Cir. 1978). That petition concerns an occupational health standard for exposure to coke oven emissions.

Counterstatement of the Case

Benzene is a naturally occurring substance found in crude oil, vegetable and animal matter, and the air we breathe. Concentrations of benzene in the ambient air—removed from any man-made source of benzene—have been observed to approach 0.5 parts of benzene per million parts of air ("0.5 ppm").[2]

Benzene is widely used as a petrochemical feed stock, as a solvent, and as an octane booster for gasoline. At one time benzene was primarily produced as a by-product of the coking process in steel mills. While the petrochemical and petroleum refining industries have supplanted the steel industry as the major source of benzene, significant amounts of benzene are still made as a by-product of the coking process.

Because benzene is recognized as a toxic material, exposure to benzene has been controlled under Section 6 of the Occupational Safety and Health Act of 1970. 29 USC 655. Initially, OSHA adopted a permissible exposure limit for benzene that was 10 ppm. However, in April 1977, in a document which came to be called the Infante Report, excess leukemia was reported among workers who were believed to have been exposed to low levels of benzene during the 1940s. OSHA interpreted this Report as demonstrating that leukemia had been found in workers exposed to benzene concentrations "significantly below

[2] *E.g.*, Testimony of Dr. Herman Kraybill of National Cancer Institute, Hearing Exhibit 84B-18, App. A at 2-3, Tr. 1176, 1192-94; Testimony of Edward Baier of National Institute of Occupational Safety and Health, Hearing Exhibit 84A at 7, Tr. 749-50, 1132.

. . . 10 ppm. . . ." OSHA Opposition to Stay Pending Judicial Review, at 9-10, filed June 1, 1977 in *American Petroleum Institute* v. *OSHA* (5th Cir., No. 77—1973). Relying on the Infante Report, OSHA issued an emergency temporary standard for benzene which reduced the permissible exposure limit from 10 ppm to 1 ppm. 42 Fed. Reg. 22516 (May 3, 1977). OSHA also proposed a permanent standard requiring the same reduction in permissible exposure limit. 42 Fed. Reg. 27452 (May 27, 1977). The temporary standard was stayed by the Fifth Circuit and never took effect.

At the administrative hearings held on the proposed permanent standard, OSHA's reliance on the Infante Report was discovered to be misplaced. As the Court below stated, the employees studied by Infante were actually exposed to benzene levels "around 100 ppm during most of the period studied with occasional exposure levels as high as several hundred parts per million." 581 F.2d at 498, n. 13; App. at 8a, n. 13. Moreover, the authors of the Infante Report repudiated the use to which OSHA had put the study. One of the authors expressly warned that anyone who used the Report to demonstrate that benzene exposures below 25 ppm had induced leukemia would be going "off the deep end. . . ." Testimony of Ronald Young, Tr. 815-816.

Nevertheless, on February 3, 1978, OSHA promulgated a permanent benzene standard in which the permissible exposure limit was reduced from 10 ppm to 1 ppm. 43 Fed. Reg. 5918 (February 10, 1978); App. at 34a-251a. OSHA justified this reduction on the following reasoning: benzene is a human carcinogen, there is no safe level of exposure to a human carcinogen, under these circumstances it is necessary for the permissible exposure to benzene to be the lowest level feasible, and 1 ppm is the lowest feasible level. 43 Fed. Reg. 5931, 5932, 5947; App. at 122a, 124a-125a, 187a. OSHA made no attempt to identify the

benefits that would be produced by such a reduction, merely asserting that the benefits were "likely to be appreciable" and that OSHA was "not obligated to carry out further exercises toward more precise calculations of benefit . . ." 43 Fed. Reg. 5941; App. at 162a-163a.

Petitions for judicial review of the benzene standard were promptly filed in the Fifth Circuit. Before the Court below, OSHA argued that it had no obligation to justify the costs of compliance with its standard in terms of the benefits received. OSHA further argued that its estimate of costs and its assumption that the benefits of the reduction "may be appreciable" were sufficient to supply any justification that might be needed. 581 F.2d at 501-503; App. at 14a-18a.

The Court below rejected both arguments. In view of the definition of an occupational health standard found in 29 USC 652(8), and the requirements for such standards established in 29 USC 655(b)(5), the Court held that OSHA did not have "unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of cost." 581 F.2d at 502; App. at 15a. OSHA was required "to determine whether the benefits expected from the standard bear a reasonable relationship to the costs imposed by the standard." 581 F.2d at 503; App. at 17a.

The Court then found that OSHA had not demonstrated such a reasonable relationship. Although the costs of the benzene standard were adequately known, OSHA had not determined its benefits, choosing instead to rely on the assumption that the benefits "may be appreciable". 581 F.2d at 503-505; App. at 17a-21a. Since there was no way to establish a reasonable relationship between costs and benefits without information on the benefits, the Court set the benzene standard aside.

Reasons for Granting the Writ

Also pending before this Court are two petitions for certiorari relating to an occupational health standard for exposure to coke oven emissions, Republic's petition No. 78-918 and that of the American Iron and Steel Institute, No. 78-919. The issues involved in the two benzene petitions and the two coke oven petitions are similar because OSHA used the same reasoning process to develop the permissible exposure limit for benzene that it used in developing the permissible exposure limit for coke oven emissions. In both cases OSHA determined that the substance to be regulated was a carcinogen. It then determined that there was no safe level of exposure to a carcinogen; and made the judgment that exposure to a carcinogen should be reduced to the lowest level feasible. Finally, OSHA set what it believed was the lowest feasible level, concluding that it was one part per million for benzene and 0.15 milligrams of the benzene soluble fraction of total particulate matter per cubic meter of air ("0.15 mg/m^3 BSFTPM") for coke oven emissions.

The feasibility of the permissible exposure limit and the health standard itself was challenged both in the benzene case and in the coke oven case. Feasibility involves both economic and technological considerations.[3] In the benzene case, petitioners' challenge was directed to the reasonableness of the costs of the standard in relation to its alleged benefits. In the coke oven case, Republic challenged both the economic and technological feasibility of the coke oven standard. In the benzene case, the Fifth Circuit found that OSHA was required to determine whether the benefits of the standard bore a "reasonable relationship" to its costs and, in the absence of substantial evidence of benefits,

[3] ". . . the Secretary has consistently established standards requiring the lowest level of exposure that can be achieved within the bounds of economic and technological feasibility." Secretary of Labor's petition for certiorari in No. 78-1036, at 12.

was compelled to set the standard aside. In the coke oven case, however, in order to determine economic feasibility, the Third Circuit looked solely at industry's ability to bear the cost of the standard and, upon finding that the standard would not cause "massive economic dislocation", held the standard to be economically feasible. 577 F.2d at 835-837. With respect to technological feasibility, the Third Circuit found that OSHA's decision to establish the 0.15 mg/m^3 BSFTPM exposure limit was a policy judgment and therefore immune from review on the basis of substantial evidence. 577 F.2d at 833.

As noted at page 13 of the Secretary of Labor's petition for certiorari, these two decisions conflict not only in result but also in reasoning. To reach the economic test of "reasonable relationship", the Fifth Circuit explicitly rejected OSHA's argument that it was enough to establish that the benzene standard did not "threaten the financial welfare of the affected firms." 581 F.2d at 503; App. at 17a. To hold that the feasibility of the permissible exposure limit was a matter of policy, the Third Circuit explicitly rejected Republic's argument that feasibility was a factual issue subject to judicial review on the basis of substantial evidence in the record. 577 F.2d at 833.

The economic resources of industry are limited. Under such circumstances, some means must be found for allocating available resources on the basis of health need. To do this, at least a rough estimate of the health need (*i.e.*, the benefits to be derived from the regulation) is necessary. For these reasons, Republic believes the Fifth Circuit was correct in insisting that OSHA quantify the benefits to be derived from the benzene standard. Moreover, because the Occupational Safety and Health Act explicitly requires that judicial review be based on substantial evidence in the record, 29 USC 655(f), Republic believes the Fifth Circuit was correct in requiring substantial evidence to support OSHA's conclusions with respect to the feasibility of the benzene standard.

Conclusion

We do not agree with the contentions of the Secretary of Labor and IUD that the Fifth Circuit erred in remanding the benzene standard. However, we do agree that the decisions of the Fifth Circuit and the Third Circuit conflict. Accordingly, we believe this Court should grant certiorari to review both decisions and to resolve these important issues.

Respectfully submitted,

FRANK E. MORRIS
MICHAEL A. KAUFMAN
PENNIE & EDMONDS
330 Madison Avenue
New York, N.Y. 10017
(212) 986-8686
Counsel for Respondent,
Republic Steel Corporation

Of Counsel:

EDWARD P. WEBER, JR.
Republic Steel Corporation
P.O. Box 6778
Cleveland, Ohio 44101

January 26, 1979